

11-29-2013

# Warren v. Williams & Parsons PC CPAS Appellant's Brief Dckt. 41209

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IN THE SUPREME COURT OF THE STATE OF IDAHO

SU WARREN,

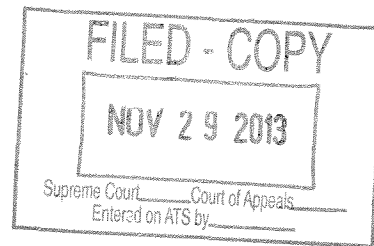
Claimant/Appellant,

v.

WILLIAMS & PARSONS PC CPAS,  
Employer, and IDAHO STATE  
INSURANCE FUND, Surety,

Defendants/Respondents.

Supreme Court No. 41209



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**APPELLANT'S BRIEF**

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On appeal from the Industrial Commission  
State of Idaho

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NED A. CANNON  
CANNON LAW FIRM  
504 Main Street, Ste. 420  
Lewiston, Idaho 83501  
Telephone: (208) 743-9428  
Facsimile: (208) 746-8421

Attorney for Claimant/Appellant

H. James Magnuson  
ATTORNEY AT LAW  
1250 Northwood Center Court, Ste. A  
P.O. Box 2288  
Coeur d'Alene, Idaho 83816  
Telephone: (208) 666-1596  
Facsimile: (208) 666-1700

Attorney for Defendants/Respondents

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## STATEMENT OF THE CASE

This is a case where the Industrial Commission's referee selectively chose evidence to reach the conclusion that Ms. Warren failed to show permanent partial impairment of a physical and nature, and the referee ignored evidence to the contrary. After the referee culled evidence favorable to Ms. Warren's position, the referee refused to stay hearings in order for Ms. Warren to obtain her treating neuropsychologist's updated psychological evaluation records. Once Ms. Warren obtained the records, she immediately forwarded the same to the Defendants and moved to vacate a pending hearing to allow for review and response by Defendants. However the referee refused to admit the records as "untimely" rather than defer the hearing.

This is a case where the Commission's determination regarding Ms. Warren's condition was unsupported by substantial or competent evidence—indeed, the substantial and competent evidence the Commission needed to reach its decision was erroneously excluded, and further recommended care was denied.

### **Ms. Warren's injury**

Ms. Warren was working at her desk at Williams & Parsons in January 2007 when a vehicle crashed into and through the wall of her office. The force of the vehicle sent her computer hurtling through the air, striking her in the head and shoulder. In her own words,

I was sitting at my desk doing regular work that I would be doing. I believe it was about 3:30 in the afternoon. There were two of us in the same office with a little partition between us, and the other girls had left

for the day, so I was basically on my side of the office by myself. And my desk was set so it was up against a wall and there was a wall in front of me with a window.

And all of a sudden I started feeling this shaking and terrible noise, and I thought, Oh lord, is this the end of the earth? And so I thought, Oh, no, maybe we are having an earthquake.

And the next thing I remember I was up against the wall at the far side of the room. I had been at the front side, which was probably 15 to 20 feet. And I guess I screamed because everybody was running towards the office asking what had happened.<sup>1</sup>

As the car broke through the wall, Ms. Warren's chair was shot back 15 to 20 feet. She was hit in the head with what she believed was her computer monitor.<sup>2</sup>

In addition to physical injuries, Ms. Warren stated that she suffered diminished brain function after the accident: she had difficulty remembering words, difficulty remembering events, difficulty concentrating, and difficulty with speech.<sup>3</sup>

Ms. Warren underwent physical therapy from January 2007 until September 2007 when she endured surgery on her neck. According to Ms. Warren, the physical therapy exacerbated the pain and numbness in her neck and arms.<sup>4</sup> Plaintiff's Exhibit G-2 contains the account of Ms. Warren's neck surgery. Plaintiff's Exhibit G-3 contains the record of Ms. Warren's physical therapy after the surgery.

Ms. Warren suffered a motorcycle accident June 29, 2008; she was riding on the back of a motorcycle when the driver hit a deer. While the accident caused her a dislocated left shoulder, a torn rotator cuff, and a broken leg, Ms. Warren stated at the May 2012 hearing that the accident did not affect her symptoms from the car crash.

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<sup>1</sup> Hearing Tr., pp. 26-27; See also Plaintiff's Ex.D-1.

<sup>2</sup> Id.

<sup>3</sup> Hearing Tr. pp.29-30; See also Exhibit G-4-00004.

<sup>4</sup> Hearing Tr., p.28.

According to Ms. Warren “as far as changing how my arms and my hands and my neck felt, the deer/motorcycle accident did not seem to affect that, either positively or negatively, nothing there changed.”<sup>5</sup>

### **The May 2012 hearing and the referee’s refusal to grant a stay**

The Industrial Commission held a hearing on May 10, 2012. At the hearing Ms. Warren testified that she continued to suffer pain from the industrial accident. Two weeks prior to the hearing she noted significant pain from sitting in a car for 45 minutes.<sup>6</sup> At the hearing she also stated that she has attempted numerous treatments for pain, from massage to physical therapy to acupuncture. She has thus far been unable to find a stable cure for her pain.<sup>7</sup> Ms. Warren also testified that she has ongoing psychological trauma from the industrial accident.<sup>8</sup>

At the May hearing Warren moved the referee to grant a stay because she had not yet reached MMI and a recommendation to attend a pain-management program and further evaluations had been recommended by Defendants’ expert Dr. Beaver. Additionally, Warren had not yet been able to obtain a medical report from her neuropsychologist, Michelle White. The recommended pain program had the potential to alter the medical and psychological opinions, and as such, decisions on MMI and ultimately PPI and PPD. Warren renewed her motion to stay on October 5, 2012. The referee denied the motion for the following reasons:

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<sup>5</sup> Hearing Tr. p.49-50.

<sup>6</sup> Hearing Tr. p.55.

<sup>7</sup> Hearing Tr. pp.56-57.

<sup>8</sup> Hearing Tr. p.59; See also Exhibit G-4-00004.

Claimant's accident occurred in 2007. A pain management program in 2012 represents palliative treatment. It would not, contrary to Claimant's assertions, impact permanent impairment or disability. Among competing goals under the Idaho Workers' Compensation Law, finality is one. Claimant's Motion to Stay Proceedings does not show cause to further delay resolution of this matter.<sup>9</sup>

**Exclusion of exhibits regarding Warren's psychological evaluation: Exhibits 2, 12, and 19**

Ms. Warren's neuropsychologist was Dr. Michelle White. The referee deemed Dr. White's assessment inadmissible on June 12, 2012. The referee excluded Claimant's Exhibit 2 pp. 47-57, Claimant's Exhibit 12 pp. 48-69, and Claimant's Exhibit 19.<sup>10</sup> Respectively, these exhibits were as follows:

- Internal Medicine Associates June 10, 2011 assessment of Warren's "Cervical Spine Dysfunction and Chronic Pain Syndrome";
- Dr. Michelle White's April 20, 2012 "Clinical Psychological Evaluation"; and
- Su Warren's Medical Expenses.

According to the referee, the above exhibits "were produced untimely and without good cause under JRP rule 10."<sup>11</sup>

**Dr. Beaver's assessment of Ms. Warren's psychological condition**

Defense expert, Dr. Craig W. Beaver, PhD. examined Ms. Warren, and in August 2011 and again at his deposition in July 2012 he recommended she undergo a chronic pain-management program and then further evaluation.<sup>12</sup> At his deposition in July 2012, Dr. Beaver stated that Ms. Warren suffered from an "adjustment disorder

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<sup>9</sup> R. p. 32, "Order on Claimant's Motion to Stay Proceedings and Amended Briefing Schedule."

<sup>10</sup> R. p. 6, "Order on Hearing Exhibits."

<sup>11</sup> R. p. 73, "Findings and Conclusions."

<sup>12</sup> Deposition of Dr. Craig Beaver, Ex.1, 8/12/2012, Bates stamped 165.



with anxious mood” along with “components” of post-traumatic stress disorder that was 50% attributable to her work injury.<sup>13</sup> Dr. Beaver opined several times throughout his deposition that Ms. Warren’s psychological condition would benefit from a pain-management program.

Q. And as you say, your recommendation that pain treatment, pain clinic treatment also includes emotional, I would assume, then, that your recommendation for this pain treatment would then include aspects of this anxiety that you prorate roughly 50/50?

A. Yes. I think that they would address anxiety as part of a pain-management program.<sup>14</sup>

...

Q. Now, Doctor, if she did enter into such a pain-management program that you’ve said would be reasonable in this case, wouldn’t it be important, then, to reevaluate her and see how she comes out the other end of such a program as far as, you know, permanent effects of such a program or maybe better to say permanent assistance or help from such a program?

A. You know, I think that – I think that a reevaluation would not be unreasonable. I don’t know if it would be – I wouldn’t – I’d be hesitant to say whether it absolutely would need to occur or not, because it kind of would depend on how she did in the program, what the people in the program thought of her, what kind of – you know, how she does during the program. But potentially, yes, reevaluating after a pain-management program could have some value.

...

Q. And in this context if she went through such a program, wouldn’t it be fair that you would want to take a look at the results and the benefits and those records before you actually gave an opinion on whether or not further evaluation of any aspect of her conditions would be warranted?

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<sup>13</sup> Beaver Depo., p.34, ll.7-22; see generally regarding Dr. Beaver’s assessment of Su Warren’s psychological condition Deposition of Craig Weaver, pp.31-41.

<sup>14</sup> Beaver Depo., pp. 34-35, ll. 23-25, 1-5.

A. Yes, that would be reasonable.<sup>15</sup>

Dr. Beaver reviewed the assessment done by Ms. Warren's neuropsychologist, Dr. Michelle White. Dr. White's report was titled "Clinical Psychological Evaluation," contained in Exhibit 2 and excluded by the Commission's referee. Dr. Beaver's deposition continued:

Q. Doctor Beaver you said that in your report early on that you had seen some of Dr. Michelle White's handwritten notes or records. Did I read that correctly in your initial report?

A. You know, I – that may be in terms of the handwritten. You know, probably the best thing that I have that I've most recently looked at when I was preparing for today would have been her updated report on 4/20/12 where she kind of summarizes things.

Q. Okay. That was a typewritten report.

A. Yes. It's entitled "Clinical Psychological Evaluation."<sup>16</sup>

...

Q. In that particular report in her "Conclusions and Recommendations," No. 2 she recommends "Further consultation with a psychiatrist to address pain, sleep, emotional sequelae from her injury," which the 2007 injury, "from a psychotropic standpoint can be beneficial." And then she mentioned a psychiatrist in Spokane. Do you take issue with that conclusion/recommendation?

A. Well, I think that consultation about her medicine with regard to pain, sleep, and emotional things is a reasonable thing, done within the context of a pain-management program is a reasonable thing, done within the context of a pain-management program, because they're all linked together.<sup>17</sup>

...

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<sup>15</sup> Beaver Depo., pp. 36-37, ll. 22-25, 1-19.

<sup>16</sup> Beaver Depo., pp. 37-38, ll. 21-25, 1-8.

<sup>17</sup> Beaver Depo., pp. 38-39, ll. 17-25, 1-5.

**Q.** Okay. And if we do follow your recommendation here and she does go into this type of a pain-management program, would you be willing to do a follow-up evaluation and report in this matter?

**A.** Sure, if that's needed.<sup>18</sup>

## **ISSUES ON APPEAL**

### **The Commission's determination that Ms. Warren had reached MMI**

1. Whether the Industrial Commission lacked substantial and competent evidence when it determined that "Claimant failed to show [Warren] suffered permanent impairment of mental or emotional or psychological nature as a result of the work accident"?<sup>19</sup>
2. Whether the Industrial Commission erred by not allowing Claimant to undertake the continued care prescribed by Dr. Craig Beaver and Dr. Michelle White and then, once maximum medical improvement was reached, to undergo evaluation and rating for MMI, PPI, and PPD?

### **Hearing referee's denial of Ms. Warren's motion to stay hearing**

3. Whether the Industrial Commission erred in denying Claimant's motions to vacate hearing, and as such, forcing Claimant to hearing prior to her having reached maximum medical improvement ("MMI") and prior to her completing medically prescribed care and treatment, and prior to her having procured medical opinions as to her MMI and as to her ratings for PPI and PPD?
4. Whether the Industrial Commission erred in denying Claimant's motion to vacate the hearing to allow full presentment of Internal Medicine Associate, Claimant's Exhibit 2 and Dr. Michelle White's records, Hearing Exhibit 12, and sampling of unpaid expenses, Claimant's Exhibit 19?

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<sup>18</sup> Beaver Depo., p. 40, ll. 10-14.

<sup>19</sup> R. p. 84, "Findings and Conclusions" ¶ 64.

### **Hearing officer's exclusion of Ms. Warren's Exhibits 2, 12, and 19**

5. Whether the Industrial Commission erred in denying admission of Claimant's Hearing Exhibit 2, pp. 47-57, Exhibit 12, pp. 48-69, and Exhibit 19?

### **Attorney's fees and costs before the Commission and on appeal**

6. Whether the Commission abused its discretion in failing to award Ms. Warren attorney fees and costs pursuant to Idaho Code § 72-804?
7. Whether attorney fees and costs are warranted on this appeal pursuant to Idaho Code § 72-804 and Idaho Appellate Rule 41 based on the grounds that Ms. Warren's employer and surety refused to pay workers' compensation benefits without reasonable grounds to do so?

## **ARGUMENT**

### **Standard of Review**

The Idaho Supreme Court's posture for reviewing Industrial Commission decisions is set forth in *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 565, 130 P.3d 1097, 1103 (2006):

It is the role of the Industrial Commission, not this Court, to determine the weight and credibility of testimony and to resolve conflicting interpretations of testimony. On appeal, this Court will not conduct a de novo review of the evidence or consider whether it would have reached a different conclusion from the evidence presented. This Court will not disturb the Commission's factual findings if they are supported by substantial and competent evidence. Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion. (citations omitted).

However, “[w]hether the Commission correctly applied the law to the facts is an issue of law over which [this Court] exercise[s] free review.” *Pierce v. Sch. Dist. No. 21*, 144 Idaho 537, 538, 164 P.3d 817, 818 (2007) (quoting *Konvalinka v. Bonneville*

*Cnty.*, 140 Idaho 477, 478, 95 P.3d 628, 629 (2004)). Further, the Commission's determinations “on the weight and credibility of the evidence should not be disturbed on appeal unless they are clearly erroneous.” *Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999).

On appeal, when reviewing a decision regarding the admissibility of testimony, the Idaho Supreme Court’s standard of review is limited to determining whether there has been a clear and manifest abuse of discretion. *Fowler v. Kootenai County*, 128 Idaho 740, 743, 918 P.2d 1185, 1188 (Idaho 1996) (citing *Mac Tools, Inc. v. Griffin*, 126 Idaho 193, 199, 879 P.2d 1126, 1132 (1994)). While a strong presumption of validity favor’s an agency’s actions, this Court may reverse an Industrial Commission decision regarding admissibility when there has been an abuse of discretion. *Chisholm v. Idaho Dept. of Water Resources*, 142 Idaho 159, 163, 125 P.3d 515, 519 (2005) (in the context of the Court’s standard of review of a hearing officer’s admission decision).

The terms of Idaho's workers' compensation statute are liberally construed in favor of the employee. *Haldiman v. Am. Fine Foods*, 117 Idaho 955, 956–57, 793 P.2d 187, 188–89 (1990). However, conflicting facts need not be construed liberally in favor of the worker. *Bennett v. Bunker Hill Co.*, 88 Idaho 300, 305, 399 P.2d 270, 272 (1965); *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 755, 302 P.3d 718, 723 (2013).

**The Commission's determination that Ms. Warren had reached MMI is unsupported by substantial and competent evidence**

The Commission lacked substantial and competent evidence when it reached the following conclusion:

Claimant failed to show [Warren] suffered permanent impairment of mental or emotional or psychological nature as a result of the work accident. *Dr. Beaver's assessment appears well supported by the evidence of record and is uncontradicted.* Claimant's suggestion that she might show psychological PPI if given more time is unpersuasive. [...] Claimant's belated attempts to produce evidence supporting a theory of a psychological injury requiring treatment and causing permanent impairment do not explain her failure to produce timely records.<sup>20</sup>

Contrary to the Commission's claim, Dr. Beaver supported further care and treatment and evaluation that would belie current finding of MMI. Dr. Beaver's August 2011 assessment was more fully clarified in his July 2012 deposition. In August 2011 Dr. Beaver stated that "In my opinion, Ms. Warren does not warrant additional permanent partial impairment for her anxiousness. There was no evidence to warrant permanent partial impairment for neurocognitive issues."<sup>21</sup> Perhaps that is the reference the Commission mistakenly relied upon. However, had the Commission also read Dr. Beaver's deposition transcript, the Commission could not have issued its medical decision that Ms. Warren had reached MMI.

Nearly a year after Dr. Beaver wrote the above assessment, erroneously relied on by the Commission, he stated that Ms. Warren suffered from an "adjustment disorder with anxious mood" and "components" of post-traumatic stress disorder that

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<sup>20</sup> R. p. 84, "Findings and Conclusions" ¶ 64 (emphasis added).

<sup>21</sup> Beaver Depo., Ex. 1, ¶ 5, bates stamped p. 165.

were 50% attributable to her work injury.<sup>22</sup> Dr. Beaver opined several times throughout the deposition that Ms. Warren's condition would benefit from a pain management program. Dr. Beaver continued in his deposition:

Q. [Cannon] And as you say, your recommendation that pain treatment, pain clinic treatment also includes emotional, I would assume, then, that your recommendation for this pain treatment would then include aspects of this anxiety that you prorate roughly 50/50?

A. [Dr. Beaver] Yes. I think that they would address anxiety as part of a pain-management program.<sup>23</sup>

...

Q. [Cannon] Now, Doctor, if she did enter into such a pain-management program that you've said would be reasonable in this case, wouldn't it be important, then, to reevaluate her and see how she comes out the other end of such a program as far as, you know, permanent effects of such a program or maybe better to say permanent assistance or help from such a program?

A. [Dr. Beaver] You know, I think that – I think that a reevaluation would not be unreasonable. I don't know if it would be – I wouldn't – I'd be hesitant to say whether it absolutely would need to occur or not, because it kind of would depend on how she did in the program, what the people in the program thought of her, what kind of – you know, how she does during the program. But potentially, yes, reevaluating after a pain-management program could have some value.

...

Q. [Cannon] And in this context if she went through such a program, wouldn't it be fair that you would want to take a look at the results and the benefits and those records before you actually gave an opinion on whether or not further evaluation of any aspect of her conditions would be warranted?

A. [Dr. Beaver] Yes, that would be reasonable.<sup>24</sup>

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<sup>22</sup> Beaver Depo., p.34, ll.7-22; see generally regarding Dr. Beaver's assessment of Su Warren's psychological condition Deposition of Craig Weaver, pp.31-41.

<sup>23</sup> Beaver Depo., pp. 34-35, ll. 23-25, 1-5.

<sup>24</sup> Beaver Depo., pp. 36-37, ll. 22-25, 1-19.

Dr. Beaver reviewed Dr. White's "Clinical Psychological Evaluation," contained in Exhibit 2 and excluded by the Commission's referee.

**Q.** Doctor Beaver you said that in your report early on that you had seen some of Dr. Michelle White's handwritten notes or records. Did I read that correctly in your initial report?

**A.** You know, I – that may be in terms of the handwritten. You know, probably the best thing that I have that I've most recently looked at when I was preparing for today would have been her updated report on 4/20/12 where she kind of summarizes things.

**Q.** Okay. That was a typewritten report.

**A.** Yes. It's entitled "Clinical Psychological Evaluation."<sup>25</sup>

...

**Q.** In that particular report in her "Conclusions and Recommendations," No. 2 she recommends "Further consultation with a psychiatrist to address pain, sleep, emotional sequelae from her injury," which the 2007 injury, "from a psychotropic standpoint can be beneficial." And then she mentioned a psychiatrist in Spokane. Do you take issue with that conclusion/recommendation?

**A.** Well, I think that consultation about her medicine with regard to pain, sleep, and emotional things is a reasonable thing, done within the context of a pain-management program is a reasonable thing, done within the context of a pain-management program, because they're all linked together.<sup>26</sup>

...

**Q.** Okay. And if we do follow your recommendation here and she does go into this type of a pain-management program, would you be willing to do a follow-up evaluation and report in this matter?

**A.** Sure, if that's needed.<sup>27</sup>

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<sup>25</sup> Beaver Depo., pp. 37-38, ll. 21-25, 1-8.

<sup>26</sup> Beaver Depo. pp. 38-39, ll. 17-25, 1-5.

<sup>27</sup> Beaver Depo., p. 40, ll. 10-14.



To be clear, Ms. Warren is not asking this Court to “reweigh” the evidence. Ms. Warren is respectfully asking the Court to account for what the Commission ignored—that Defendants’ own expert opined that Ms. Warren would benefit from a pain-management program, that Dr. Beaver agreed with Ms. Warren’s neuropsychologist Dr. White that any pain-management program be done with further consultation from a psychiatrist, and that it would be reasonable for Ms. Warren to be reassessed after participating in a pain-management program. Ms. Warren contends that the Commission made its own medical decision that Ms. Warren was at MMI, and further, its decision is internally inconsistent and therefore unsupported by substantial and competent evidence.

**The Commission erred by not allowing Claimant to undertake the continued care prescribed by Dr. Craig Beaver and Dr. Michelle White and then, once MMI was reached, to undergo a rating for PPI and PPD.**

Similarly, the Commission lacked substantial and competent evidence when it concluded that she could not undertake the continued care prescribed by Dr. Beaver and Dr. White, and then, once Ms. Warren reached MMI, to undergo a rating for PPI and PPD. The Commission made a medical decision and otherwise lacked substantial and competent evidence. The Commission stated,

We are unpersuaded that it is necessary to defer the question of whether Claimant is entitled to an impairment rating for her psychological diagnosis. Claimant has not demonstrated that the underlying psychological condition to be addressed in the chronic pain management program is causally related to the subject accident under the standard set by Idaho Code § 72-451.<sup>28</sup>

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<sup>28</sup> R. p. 87, “Findings and Conclusions”, ¶ 70.

And, “Claimant failed to show it likely she is entitled to permanent disability in excess of PPI.”<sup>29</sup>

Previously, I recommended Ms. Warren be considered for a chronic pain management program such as the one and Idaho Elks Rehab Hospital’s LifeFit program or the St. Luke’s Pain Management Program in Spokane, Washington. I continue to feel this would be appropriate for Ms. Warren in helping her better manage her pain, which would improve her overall functioning. This is related in part to her work injury of 01/23/2007 and subsequent surgery as well as the orthopedic injury she suffered in the motorcycle accident in June 2008.<sup>30</sup>

However, as stated above, it was the Defendants’ witness, Dr. Beaver, who opined that Ms. Warren suffered from an “adjustment disorder with anxious mood” and “components” of PTSD. Dr. Beaver assessed that such was 50% attributable to her work injury.<sup>31</sup> Dr. Beaver in his August 2011 assessment recommended she undergo a chronic pain management program.<sup>32</sup> Dr. Beaver opined as to the potential improvement Ms. Warren could show after a pain-management program as follows:

You know, I think that—I think that a reevaluation would not be unreasonable. I don’t know if it would be—I wouldn’t—I’d be hesitant to say whether it absolutely would need to occur or not, because it kind of would depend on how she did in the program, what the people in the program thought of her, what kind of—you know, how she does during the program. But potentially, yes, reevaluating after a pain-management program could have some value.<sup>33</sup>

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<sup>29</sup> R. p. 87, “Findings and Conclusions.”

<sup>30</sup> Beaver Depo., Ex.1, 8/12/2011 Report, bates stamped p.165.

<sup>31</sup> Beaver Depo., p.34, ll.7-22; see generally regarding Dr. Beaver’s assessment of Su Warren’s psychological condition Deposition of Craig Weaver, pp.31-41.

<sup>32</sup> Defendant’s Ex.2, 8/12/2012, Bates stamped 165.

<sup>33</sup> Id. at p.37.

Dr. Beaver then opined on Dr. White's evaluation and concluded that a pain management program combined with treatment of Ms. Warren's psychiatric condition would be reasonable.<sup>34</sup>

In addition to her well-documented physical injuries and surgery, Ms. Warren stated that she suffered diminished brain function after the accident: she had difficulty remembering words, difficulty remembering events, difficulty concentrating, and difficulty with speech.<sup>35</sup> At the hearing, Ms. Warren attributed 100 percent of her pain and neck problems to the January 2007 accident.<sup>36</sup>

The Commission lacked substantial and competent evidence when it determined that "Claimant has not demonstrated that the underlying psychological condition to be addressed in the chronic pain management program is causally related to the subject accident under the standard set by Idaho Code § 72-451."<sup>37</sup> Evidence in the record indicated that Ms. Warren's psychological condition was at least fifty percent caused by the work injury.

**Ms. Warren's case was prejudiced due to the referee's denial of her motion to stay proceedings while she received pain treatment**

Admittedly, the Commission's decision to refuse Ms. Warren a stay in order to obtain Dr. White's recommendations was a discretionary decision. And, Ms. Warren acknowledges that she sought numerous stays in order for her to fully present her case. Alone, the referee's decision to deny her motion for stay would not warrant an appeal.

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<sup>34</sup> Id. at pp.38-40.

<sup>35</sup> Hearing Tr. pp.29-30; See also Exhibit G-4-00004.

<sup>36</sup> Hearing Tr. pp. 64-65.

<sup>37</sup> R. p. 87, "Findings and Conclusions", ¶ 70.

However, the Commission's decision to refuse her a stay to obtain records from her neuropsychologist combined with the Commission's medical decision of MMI, and its ignoring the statements by Dr. Beaver, all effectively denied Ms. Warren a full and fair opportunity to present her case.

Ms. Warren moved the Commission to stay proceedings for three months on October 5, 2012.<sup>38</sup> The Commission denied Ms. Warren's motion.<sup>39</sup> According to the Commission,

Claimant's accident occurred in 2007. A pain management program in 2012 represents palliative treatment. It would not, contrary to Claimant's assertions, impact permanent impairment or disability. Among competing goals under the Idaho Workers' Compensation Law, finality is one.<sup>40</sup>

The Commission must have assumed that only palliative treatment was at issue and the prescribed treatment would not affect permanent impairment or disability. However, that assumption was in error in that it was based on the Commission's medical opinion that Ms. Warren had reached MMI, and further, it ignores Dr. Beaver's opinion and Dr. White's wrongfully excluded opinion.

The case was not ready for hearing due to Claimant's continued care and treatment with a neuropsychologist, Dr. Michelle White, and Ms. Warren's need for a surgical consult, along with other care and treatment. As stated in the Affidavit of Ned Cannon,

A hearing was held on May 10, 2012, over my objection. Among other things, I requested a continuance of the hearing because my client had

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<sup>38</sup> R. pp.9-10, "Motion to Stay Proceedings."

<sup>39</sup> R. pp. 32-33, "Order on Claimant's Motion to Stay Proceedings and Amended Briefing Schedule."

<sup>40</sup> R. pp. 32.

not reached MMI and a recommendation to attend a pain program had been authorized. Such objection was also supported by the fact that I had been unable to obtain medical report from Claimant's neuropsychologist, Michelle White, Ph.D.

The defendant's expert Dr. Craig W. Beaver was deposed on July 26, 2012. During said deposition the recommended pain program was discussed in depth with Dr. Beaver, attached is pages 39-40 of Dr. Beaver's deposition. Dr. Beaver agreed that it would be appropriate to reevaluate Claimant following the program to quantify any change to the Claimants impairment and disability.

Douglas Crum, CDMS was also deposed on July 26, 2012. Mr. Crum stated during his deposition that it is possible that his recommendation may change in the event that Dr. Beaver's opinion changed significantly. Attached are pages 26-33 of Mr. Crum's deposition.

The recommended pain program has the potential to alter the medical and psychological opinions and, as such an Order to Stay Proceedings is appropriate at this time and a status/scheduling conference be set in three (3) month time.<sup>41</sup>

The delay in obtaining the assessment of Dr. White was due, in large part, to Ms. Warren's inability to pay and Defendants' refusal to pay.

At the May 2012 hearing Ms. Warren again raised her motion to stay the proceedings while she sought treatment for her ongoing pain issues and physical and psychological trauma.<sup>42</sup> The prescribed care and treatment was necessary prior to a determination that Ms. Warren had or had not reached MMI. Ms. Warren was prejudiced by the Commission's refusal to stay the proceedings.

This Court has stated, "The humane purposes which [the workers' compensation law] serves leave no room for narrow, technical construction of the provisions of the Idaho Workers' Compensation Law." *Ogden v. Thompson*, 128 Idaho

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<sup>41</sup> R. pp. 12-13, "Aff. of Ned A. Cannon in Support of Motion to Stay Proceedings."

<sup>42</sup> Hearing Tr. pp. 6-9.

87, 88, 910 P.2d 759, 760 (1996). In this case, the Commission rendered a medical decision, and abused its discretion when it ruled on Ms. Warren's condition, contrary to Dr. Beaver's opinions and without allowing Ms. Warren time to obtain the written evaluation and recommendations of her neuropsychologist Dr. Michelle White.

**The Industrial Commission erred in denying admission of Claimant's hearing Exhibits 2, 12, and 19.**

The referee sustained Defendants' objection and excluded the following exhibits:

- Internal Medicine Associates June 10, 2011 assessment of Warren's "Cervical Spine Dysfunction and Chronic Pain Syndrome";
- Dr. Michelle White's April 20, 2012 "Clinical Psychological Evaluation"; and
- Su Warren's Medical Expenses.

According to the referee, the above exhibits "were produced untimely and without good cause under JRP rule 10."<sup>43</sup> This ruling was a misapplication of the rules of evidence as applied in the context of Idaho's workers' compensation law. This Court has stated as follows regarding the rules of evidence in cases before the Idaho Industrial Commission:

Strict adherence to the rules of evidence is not required in Industrial Commission proceedings and admission of evidence in such proceedings is more relaxed. When the Legislature created the Commission, it intended that proceedings before it be as "summary, economical, and simple as the rules of equity would allow." The Commission should have the discretionary power to consider any type of reliable evidence having probative value, even though that evidence

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<sup>43</sup> R. p. 73, "Findings and Conclusions."

may not be admissible in a court of law. Idaho Code § 67–5251, controlling the admission of evidence in proceedings governed by the Idaho Administrative Procedure Act, states that evidence may be admitted by the presiding officer if “it is of a type commonly relied upon by prudent persons in the conduct of their affairs.”

*Stolle v. Bennett*, 144 Idaho 44, 49–50, 156 P.3d 545, 550–51 (2007) (quotations and citations omitted). This Court has also ruled that “[e]vidence should be admitted to assist, rather than frustrate, development of the record.” *Chisholm v. Idaho Dept. of Water Resources*, 125 P.3d 515, 519 (2005) (citing IDAPA 37.01.01.600).

While a strong presumption of validity favors an agency’s actions, this Court may reverse an Industrial Commission decision regarding admissibility when there has been an abuse of discretion. *Chisholm v. Idaho Dept. of Water Resources*, 125 P.3d 515, 519 (2005) (regarding the Court’s standard of review of a hearing officer’s admission decision). The Commission has the discretionary power to consider any type of reliable evidence having probative value, even if that evidence is not admissible in a court of law. *Stolle v. Bennett*, 144 Idaho 44, 49–50, 156 P.3d 545, 550–51 (2007). “The Commission has the discretion to admit evidence if “it is a type commonly relied upon by prudent persons in the conduct of their affairs.” *Higgins v. Larry Miller Subaru-Mitsubishi*, 145 Idaho 1, 5, 175 P.3d 163, 167 (2007) (citing *Stolle v. Bennett*, 144 Idaho 44, 49–50, 156 P.3d 545, 550–51 (2007)).

The evidentiary rules of the Idaho Administrative Procedure Act are intended to be interpreted in such a way as to allow for a full presentation of all of the facts.

Idaho Code § 67-5251(1) states,

The presiding officer may exclude evidence that is irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds, or on

the basis of any evidentiary privilege provided by statute or recognized in the courts of this state. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs.

And section (2) states, “Any part of the evidence may be received in written form if doing so will expedite the hearing without substantially prejudicing the interests of any party.”

In this case, the Commission did not find that admission of the above mentioned exhibits would “prejudice” Defendants. The Commission merely found the exhibits were “untimely.” This Court has stated, “The humane purposes which it serves leave no room for narrow, technical construction of the provisions of the Idaho Workers’ Compensation Law.” *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). In this case, the Commission rendered a medical decision, and abused its discretion when it ruled on Su Warren’s condition without admitting the evaluation of Warren’s neuropsychologist Michelle White.

#### **Attorney’s fees and costs before the Commission**

The Commission abused its discretion in failing to award Ms. Warren attorney’s fees and costs pursuant to Idaho Code § 72–804 because Ms. Warren’s employer and surety contested her claim for compensation for psychological trauma caused by her work accident without reasonable grounds to do so. Indeed, Ms. Warren’s employer and surety, among other things, contested her claim for continued benefits contrary to one of their doctors and, otherwise, without reasonable grounds to do so.



The Defendants have forced Ms. Warren to present her claims to the Commission rather than spend time being medically treated and cared for as Idaho's Workers' Compensation law demands. The plain meaning of this statute is that the Commission "shall" award attorney fees to the employee when the Commission makes the determination that the denial of compensation was unreasonable. *Bradley v. Washington Group Int'l*, 141 Idaho 655, 115 P.3d 746 (2005).

The Idaho Supreme Court in *Page v. McCain Foods, Inc.*, 141 Idaho 342, 346, 109 P.3d 1084, 1088 (2005) re-stated the standard proposition:

Idaho's workers' compensation law is remedial legislation. It is a well-known canon of statutory construction that remedial legislation is to be liberally construed to give effect to the intent of the legislature. The intent of the Idaho Legislature in enacting the workers' compensation law was to provide "sure and certain relief for injured workmen ... regardless of questions of fault and to the exclusion of every other remedy."

*Id.*, 141 Idaho at 346, 109 P.3d at 1088. In this case, Su Warren was erroneously denied attorney's fees and costs before the Commission.

### **Attorney's fees and costs on appeal**

Ms. Warren respectfully petitions this Court to award her attorney's fees and costs associated with this appeal pursuant to Idaho Code § 72-804 and Idaho Appellate Rule 41. Ms. Warren has been forced to pursue this appeal in order for her to obtain the medical care advised by both Dr. Beaver and Dr. White. She further pursues this appeal due to the referee's erroneous determination that Ms. Warren had reached MMI. After the referee refused to admit important portions of Ms. Warren's evidence, he rendered a "medical"

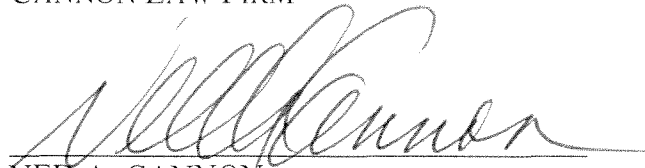
decision that Ms. Warren had reached MMI, and then cherry picked evidence from the record, rather than consider all evidence.

### CONCLUSION

Ms. Warren respectfully petitions the Court to reverse and remand this case to the Industrial Commission. Ms. Warren is entitled to her prescribed care and treatment, a full evaluation, a medical decision as to MMI, and time to prepare and present PPI and PPD ratings for consideration by the Commission. She is further entitled to all benefits to date and throughout her continued care and treatment, which was wrongfully shortened by the Commission's errors.

DATED this 27<sup>th</sup> day of November, 2013.

CANNON LAW FIRM

A handwritten signature in dark ink, appearing to read "Ned A. Cannon", written over a horizontal line.

NED A. CANNON

Attorney for Appellant/Claimant

### CERTIFICATE OF SERVICE

I hereby certify that on the 27<sup>th</sup> day of November 2013, a true and correct copy of the foregoing document was served to the following individual(s) via the indicated method:

H. James Magnuson  
ATTORNEY AT LAW  
1250 Northwood Center Court, Ste. A  
P.O. Box 2288  
Coeur d'Alene, Idaho 83816  
Telephone: (208) 666-1596  
Facsimile: (208) 666-1700

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[ ] Hand Delivery;  
[ ] Courthouse Box;  
[ ] ECF Service;  
[ ] Other:

By: 